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18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA

20 BARRY TUBB, an individual,
21 Plaintiff,
22 vs.
23 PARAMOUNT PICTURES
24 CORPORATION, a Delaware
25 corporation,
26 Defendant.

27 Case No. 2:24-cv-01417-GW-BFMx

28 **NOTICE OF MOTION AND
MOTION TO DISMISS
PLAINTIFF'S COMPLAINT
[Fed. R. Civ. Proc. 12(b)(6)]**

[Notice Of Motion And Special Motion
to Strike (C.C.P. § 425.16); Declaration
Of Dan Laidman With Exhibits D-F;
and Notice of Manual Filing Of DVDs
With Exhibits B-C Concurrently Filed;
[Proposed] Order Concurrently Lodged]

Hearing Date: June 24, 2024
Time: 8:30 a.m.
Courtroom: 9D

Action Filed: February 21, 2024

27 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

28 PLEASE TAKE NOTICE that on June 24, 2024, at 8:30 a.m., or as soon
thereafter as this matter may be heard in Courtroom 9D of the above-entitled court,
located at 350 West 1st Street, Los Angeles, CA 90012, defendant Paramount

1 Pictures Corporation (“Paramount” or “Defendant”) will and hereby does move this
 2 Court, pursuant to Federal Rule of Civil Procedure 12(b)(6), for an order dismissing
 3 the Complaint brought by Plaintiff Barry Tubb (“Plaintiff”), in its entirety, with
 4 prejudice.¹

5 This Motion is made on the following grounds: Because all of Plaintiff’s
 6 claims arise directly from the content of Paramount’s 2022 motion picture “Top
 7 Gun: Maverick” (the “Film”), a sequel to the iconic 1986 film “Top Gun” (“Top
 8 Gun” or “Original Film”),² his claims fail as a matter of law for the following
 9 reasons:

10 1. Plaintiff’s Second Cause of Action, which purports to assert a claim
 11 under Section 43 of the Lanham Act (15 U.S.C. § 1125), fails for each of the
 12 following independent reasons:

13 a. The First Amendment bars Plaintiff’s Lanham Act claim because it
 14 arises solely from the content of an expressive work, and the use of
 15 Plaintiff’s likeness is artistically relevant, and not explicitly
 16 misleading. Memorandum, Section III.A.1; Rogers v. Grimaldi, 875
 17 F.2d 994, 999 (2d Cir. 1989).

18 b. Plaintiff’s Lanham Act claim also fails as a matter of law because there
 19 could be no plausible allegation of likely consumer confusion given the
 20 context in which Plaintiff’s image appears in the Film. Memorandum,
 21 Section III.A.2.

22 2. Plaintiff’s Third and Fourth Causes of Action for misappropriation of

23
 24 ¹ Defendant concurrently is filing a Special Motion To Strike Plaintiff’s
 25 Third, Fourth, Fifth, Sixth, and Seventh Causes of Action pursuant to California
 26 Code of Civil Procedure § 425.16 (“SLAPP Motion”). This Motion incorporates by
 27 reference the relevant arguments and authorities included in the SLAPP Motion.

28 ² DVDs of both films are attached as Exhibits B-C to the concurrently-
 submitted Notice Of Manuel Filing. See Laidman Decl. ¶ 3; see also concurrently-
 filed Request For Judicial Notice (“RJN”).

1 his publicity rights should be dismissed for each of the following independent
 2 reasons:

- 3 a. The use of Plaintiff's likeness in the Film is constitutionally protected
 4 under the First Amendment, and cannot give rise to liability for
 5 misappropriation. *Id.*, Section III.B.1.
- 6 b. Plaintiff's misappropriation claims independently are barred by
 7 California's transformative-use defense. *Id.*, Section III.B.2.
- 8 c. Plaintiff's misappropriation claims also are preempted by federal
 9 copyright law, because they arise solely from the use of a photograph
 10 that includes Plaintiff's image, which falls within the subject matter of
 11 the Copyright Act, and the rights Plaintiff seeks to control are
 12 equivalent to the rights granted to copyright holders under the Act. 17
 13 U.S.C. §§ 102(a), 301(a); Memorandum, Section III.B.3.
- 14 d. Plaintiff's misappropriation claims fail because he contractually agreed
 15 that Paramount owns all rights to the character Plaintiff portrayed in
 16 the Original Film, and the agreement (which is attached to the
 17 Complaint) gives Paramount the right to use Plaintiff's likeness in
 18 connection with that character. Memorandum, Section III.B.4.

19 3. Plaintiff's Third Cause of Action for statutory misappropriation also
 20 fails for each of the following additional reasons:

- 21 a. Plaintiff's claim does not involve an alleged use of his image in
 22 connection with products, goods, or merchandise, as required by Cal.
 23 Civ. Code § 3344. *Id.*, Section III.B.5.
- 24 b. Plaintiff's claim is barred by the statute's exemption for claims
 25 purporting to arise from the depiction of a person as part of a definable
 26 group, where the individual is not singled out. Cal. Civ. Code §
 27 3344(b)(2)-(3); Memorandum, Section III.B.5.

28 4. Plaintiff's Fifth Cause of Action for negligent hiring, supervision,

1 and/or retention fails for each of the following independent reasons:

2 a. The claim is derivative of Plaintiff's misappropriation claims, and fails
 3 for the same reasons. Memorandum, Section III.C.
 4 b. Plaintiff has not pleaded (and cannot plead) that Paramount owed him
 5 any legally-cognizable duty, as required to give rise to a negligence
 6 claim. Id.

7 5. Plaintiff's Sixth Cause of Action for breach of contract fails because he
 8 cannot identify any provision in the relevant contract that Paramount breached, and
 9 because the Agreement expressly authorizes the challenged use of his image in
 10 connection with the character he portrayed in the Original Film. Id., Section III.D.

11 6. Plaintiff's First Cause of Action for declaratory relief fails because it is
 12 derivative of Plaintiff's other claims and fails for the same reasons as those claims.
 13 Id., Section III.E.

14 7. Plaintiff's Seventh Cause of Action for injunctive relief fails because it
 15 is a remedy, not a cause of action; in addition, granting injunctive relief in this case
 16 would constitute an improper prior restraint, in violation of Paramount's First
 17 Amendment rights. Id., Section III.F.

18 This Motion is based on this Notice; on the attached Memorandum Of Points
 19 And Authorities; on the concurrently-filed Request For Judicial Notice; Declaration
 20 Of Dan Laidman With Exhibits D-F; on the Notice Of Manual Filing Of DVDs
 21 With Exhibits B-C; on any other matters of which this Court may take judicial
 22 notice; on all pleadings, files and records in this action, including the concurrently-
 23 filed SLAPP Motion; and on such argument as may be received by this Court at the
 24 hearing on this Motion.

25 This Motion is made following the conference of counsel pursuant to Local
 26 Rule 7-3, which took place on April 11, 2024. See Laidman Decl. ¶ 8.

27 For all of the reasons stated, Paramount respectfully requests that this Court
 28 dismiss Plaintiff's lawsuit in its entirety, including its First, Second, Third, Fourth,

1 Fifth, Sixth, and Seventh Causes of Action, with prejudice.

2 DATED: April 18, 2024

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6 By: /s/ Kelli L. Sager
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MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF ARGUMENT

“Recognizing that First Amendment concerns in free expression are particularly present in the realm of artistic works,” the Ninth Circuit has adopted a strict test designed to curtail meritless Lanham Act claims targeting the content of expressive works. Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 807 (9th Cir. 2003). Such claims must be dismissed unless the use has “no artistic relevance,” or if it “explicitly misleads as to the source or the content of the work.” Id. Where it is clear from the Complaint and the work itself that this test is not satisfied, the claim should be dismissed with prejudice.

This is just such a case. Plaintiff's claims arise from a scene in "Top Gun: Maverick," a sequel to the iconic 1986 film "Top Gun." Plaintiff acted in the Original Film; he is shown briefly in a group photograph identified as the 1986 Top Gun class, which connects the Film's storyline to events in its predecessor. Plaintiff does not appear anywhere else in the Film (and is not listed in the credits), or in any related advertising or merchandising. Paramount's use of Plaintiff's image in this context clearly is protected by the First Amendment, and other well-established law.

First, because Plaintiff’s Lanham Act claim arises from the content of an artistic work, it is subject to the constitutionally-based Rogers test (derived from Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989)). The use of Plaintiff’s image in the Film is artistically relevant and not explicitly misleading; consequently, his claim cannot survive constitutional scrutiny. Section III.A. Moreover, as a matter of law, this kind of use cannot plausibly cause any likelihood of confusion. Id.

Second, the First Amendment also bars Plaintiff’s statutory and common law misappropriation claims. Section III.B.1. Courts consistently have held such claims cannot arise from expressive works like films, given the heightened constitutional protection that applies to such content-based claims. Id. Plaintiff’s claims also are barred under California’s “transformative use” defense, because his

1 image was, at most, a small piece of the “raw material” utilized in the Film. Winter
 2 v. DC Comics, 30 Cal.4th 881, 888 (2003); Section III.B.2.

3 Third, Plaintiff’s right-of-publicity claims are preempted by copyright law,
 4 because they arise from acts equivalent to the exclusive rights granted under federal
 5 law – the reproduction and display of a copyrighted work. Section III.B.3.

6 Fourth, the parties’ 1985 Agreement gave Paramount the unfettered right to
 7 use Plaintiff’s image in connection with the character he played. Section III.B.4.
 8 And his statutory claim independently fails because Section 3344 applies only to
 9 uses connected to products and merchandise, not expressive works like the Film.
 10 Section III.B.5. The statute also exempts group photographs, like the one here,
 11 where the plaintiff is not singled out. Id.

12 Fifth, Plaintiff’s tack-on negligence claim duplicates his right-of-publicity
 13 claims, and fails for the same reasons. Section III.C. Plaintiff also cannot plead
 14 any legally-cognizable duty owed to him by Paramount. Id.

15 Sixth, Plaintiff’s contract claim fails because Paramount did not breach any
 16 term of their Agreement; instead, it expressly authorizes the use here. Section III.D.

17 Seventh, Plaintiff’s First Cause of Action for declaratory relief is derivative
 18 of Plaintiff’s other claims, and fails for the same reasons. Section III.E.

19 Finally, Plaintiff’s claim for injunctive relief does not state a separate cause
 20 of action, and would be an unconstitutional prior restraint. Section III.F.

21 For all of these reasons, Paramount respectfully requests that this Court grant
 22 the Motion, and dismiss Plaintiff’s Complaint with prejudice.

23 **II. STATEMENT OF FACTS**

24 In the film “Top Gun,” Tom Cruise portrayed a talented, arrogant fighter pilot
 25 (nicknamed “Maverick”), participating in the Navy’s elite “Top Gun” training
 26 program. Anthony Edwards’ character (“Goose”) was Maverick’s wingman and
 27 best friend; Val Kilmer played “Iceman,” Maverick’s rival. During a training
 28 exercise, Maverick’s plane suffers engine failure, resulting in an accident in which

1 Goose dies; Maverick has to overcome his guilt and other emotional baggage to
 2 save Iceman's life when the trainees face actual combat. Ex. C at 1:04:00-1:09:15;
 3 1:28:01-1:41:29.

4 Plaintiff appeared in "Top Gun" as "Wolfman," another trainee, who is
 5 depicted wearing a cowboy hat and silver watch. E.g., Ex. C at 26:49; 33:41-33:48.
 6 The Complaint alleges that Plaintiff entered into a contract in 1985 ("Agreement")
 7 to participate in the Original Film. Cmplt. ¶ 113. It provides that Paramount is "the
 8 sole and exclusive owner of all rights in the role or character portrayed by
 9 [Plaintiff], including name, likeness and distinctive characterizations thereof";
 10 Paramount has the unfettered right "to merchandise and exploit such role or
 11 character," and "to use [Plaintiff]'s name and likeness in connection therewith...."
 12 Cmplt. ¶ 117; Pl. Ex. A at 7 ¶ A (emphasis added).

13 Plaintiff alleges that photographer Herb Ritts took a "behind-the-scenes"
 14 picture ("Photograph") depicting cast members with Navy pilots who "flew in and
 15 consulted on the" Original Film. Cmplt. ¶ 39; Pl. Ex. C. The Photograph shows
 16 cast members wearing the flight suits their characters wore in "Top Gun"; Plaintiff
 17 also is wearing his character's "signature" cowboy hat. See Pl. Ex. C; Ex. D.

18 The Film was released in 2022. It takes place 30 years later, focusing on a
 19 new generation of pilots Maverick must train for a risky mission. Ex. B. Much of
 20 the Film focuses on Maverick's fraught relationship with trainee Rooster, who is
 21 Goose's son. Rooster's rival ("Hangman") and another classmate learn about this
 22 history when they see a photograph of the 1986 Top Gun class, including Maverick
 23 and Goose, on a plaque with their characters' names, and realize Goose and Rooster
 24 have the same last name. See Pl. Ex. C; Ex. D.

25 The picture used in the Film is a slightly altered version of the Photograph. It
 26 only appears for a few seconds, starting with the entire "Class of 1986" before
 27 zooming in briefly on Maverick and Goose, as Hangman points them out to his
 28

1 classmate. Ex. B at 44:22-44:28. Wolfman is standing partly behind Maverick in
 2 the photo. Ex. D.

3 Plaintiff's seven causes of action all arise solely from the inclusion of his
 4 image in the Photograph, as depicted briefly in that scene. Cmplt. ¶¶ 61-126.

5 **III. PLAINTIFF'S CLAIMS FAIL AS A MATTER OF LAW.**

6 A motion under Rule 12(b)(6) tests the legal sufficiency of a complaint. In
 7 adjudicating the motion, the court is not required to construe "conclusory
 8 allegations of law and unwarranted inferences" in favor of the nonmoving party. In
 9 re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996). The court may
 10 consider materials referenced in the Complaint, as well as material that may
 11 properly be judicial noticed.³

12 Plaintiff's claims arise entirely from the Film's content, which is referenced
 13 (along with the Original Film) throughout his Complaint. E.g., Cmplt. ¶¶ 1-11, 33-
 14 48. The films' content may be considered on a motion to dismiss. See Brown v.
 15 Electronic Arts, 724 F.3d 1235, 1248 n.7 (9th Cir. 2013) (dismissing Lanham Act
 16 claim involving video game; "district court properly considered" game "through the
 17 'incorporation by reference' doctrine").⁴ As discussed below, a review of the films'
 18 content and the Complaint make clear Plaintiff's claims are baseless.

19 **A. Plaintiff's Lanham Act Claim Fails.**

20 **1. The First Amendment Bars Plaintiff's Lanham Act Claim.**

21
 22
 23 ³ See Tellabs v. Makor Issues & Rights, 551 U.S. 308, 322 (2007) (court may
 24 consider "documents incorporated into the complaint by reference"); Knievel v.
 25 ESPN, 393 F.3d 1068, 1076-77 (9th Cir. 2005) (12(b)(6) motion properly
 26 considered web pages referenced in complaint); concurrently-filed RJN.

27 ⁴ See also Jackson v. Netflix, 506 F.Supp.3d 1007, 1013 (C.D. Cal. 2020)
 28 (taking judicial notice of TV program's content in granting 12(b)(6) motion); Louis
Vuitton Malletier S.A. v. Warner Bros. Entm't, 868 F.Supp.2d 172, 176 n.6
 (S.D.N.Y. 2012) (same; content of film).

1 This Circuit has “adopted the Second Circuit’s approach from Rogers v.
 2 Grimaldi, which requires courts to construe the Lanham Act to apply to artistic
 3 works **only** where the public interest in avoiding consumer confusion outweighs the
 4 public interest in free expression.” E.S.S. Entertainment 2000 v. Rock Star Videos,
 5 547 F.3d 1095, 1099 (9th Cir. 2008); see also Brown, 724 F.3d at 1239. Under the
 6 Rogers test, no claim can arise under the Lanham Act “unless the [use] has no
 7 artistic relevance to the underlying work whatsoever, or, if it has some artistic
 8 relevance, unless the [use] explicitly misleads as to the source or the content of the
 9 work.”” Id. (quoting Rogers, 875 F.2d at 999). See also University of Alabama Bd.
 10 of Trustees v. New Life Art, 683 F.3d 1266, 1278 (11th Cir. 2012) (test applies to
 11 “false endorsement claims”) (collecting cases).⁵

12 The importance of protecting First Amendment rights warrants dismissal of
 13 claims involving expressive works at the earliest possible stage. See Louis Vuitton,
 14 868 F.Supp.2d at 183-84 (“[i]n a case such as this one, no amount of discovery will
 15 tilt the scales in favor of the mark holder at the expense of the public’s right to free
 16 expression”); Jackson, 506 F.Supp.3d at 1014 (same; “[t]he Ninth Circuit applies
 17 Rogers to Lanham Act claims, often at the Rule 12 stage”). Plaintiff cannot meet
 18 his burden under the Rogers test.

19 a. **Rogers’ Artistic Relevance Threshold Is Easily Met Here.**

20 In measuring artistic relevance, the “bar is set low: the level of relevance
 21 merely must be above zero.” Twentieth Century Fox v. Empire Distrib., 875 F.3d
 22
 23

24 ⁵ In Jack Daniel’s Properties v. VIP Products, 599 U.S. 140 (2023), the Court
 25 limited application of Rogers where a defendant used the plaintiff’s trademark to
 26 identify the source of its own merchandise; in other words, it “used a trademark as a
 27 trademark.” Id. at 146. That did not alter application of the test to expressive
 28 works. See Punchbowl v. AJ Press, 90 F.4th 1022, 1031 (9th Cir. 2024) (Jack
Daniel’s “was confined to a ‘narrow’ point of law, that Rogers does not apply when
 a mark is used as a mark”; thus “preexisting Ninth Circuit precedent adopting and
 applying Rogers otherwise remains intact and binding”).

1 1192, 1198 (9th Cir. 2017). See also Louis Vuitton, 868 F.Supp.2d at 178 (test is
 2 satisfied “unless the use ‘has **no** artistic relevance to the underlying work
 3 **whatsoever**’”) (citing Rogers).

4 Plaintiff’s Complaint effectively concedes the issue of artistic relevance. His
 5 claims arise from a scene in the Film in which trainees discover the relationship
 6 between Maverick and Rooster’s father by looking at a photograph depicting the
 7 1986 Top Gun class. Cmplt. ¶ 38; Ex. B at 44:22-44:44. That scene, and the group
 8 photograph, is significant to the Film’s plot, as Plaintiff asserts. Cmplt. ¶ 38
 9 (describing scene as “pivotal”). This satisfies the first prong of the Rogers test. See
 10 Sporting Times v. Orion Pictures, 291 F.Supp.3d 817, 825-26 (W.D. Ky. 2017) (test
 11 met where “the face of the Complaint describes the artistic connection”); E.S.S.,
 12 547 F.3d at 1100 (“low threshold” for artistic relevance met because plaintiff’s
 13 mark furthered the work’s “look and feel”); Louis Vuitton, 868 F.Supp.2d at 178
 14 (use of product in movie scene was artistically relevant to introduce “comedic
 15 tension” between characters).

16 **b. Nothing In The Film Is Explicitly Misleading.**

17 Plaintiff cannot satisfy the second prong of the Rogers test because the Film
 18 does not “explicitly mislead[] as to the source or the content of the work.” Empire,
 19 875 F.3d at 1196. This inquiry requires “an ‘explicit indication,’ ‘overt claim,’ or
 20 ‘explicit misstatement’ that caused such consumer confusion.”” Id. at 1199
 21 (quoting Rogers, 875 F.2d at 1001; emphasis added).

22 Plaintiff does not, and cannot, identify any “explicit” or “overt” indication
 23 that he endorsed the Film.⁶ Empire, 875 F.3d at 1199. He tries to claim confusion
 24

25 ⁶ Plaintiff points to screen credits as an established means of identifying
 26 individuals involved with a particular work (e.g., Cmplt. ¶ 37, Ex. B); but he was
 27 not mentioned in the Film’s credits. Ex. B at 2:01:36-2:09:43. See also Dickinson
 28 v. Ryan Seacrest Enterprises, 2018 WL 6112628, at *6 (C.D. Cal. Oct. 1, 2018),
 aff’d 839 Fed.App’x 110 (9th Cir. 2020) (dismissing celebrity’s Lanham Act claim
 under Rogers because her appearance in a TV show was not an “explicit” indication

1 based solely on his image being in a photograph shown briefly in the Film, but “[i]t
 2 is well established that the use of a mark alone is not enough to satisfy this prong of
 3 the Rogers test.” Brown, 724 F.3d at 1245. Nor can it be met by speculation about
 4 the “impact of the use”; instead, Plaintiff must point to something in the Film that
 5 “explicitly” suggests that he endorsed it. Id. 1246 (original emphasis). Because
 6 Plaintiff cannot satisfy the Rogers test, his Lanham Act claim is constitutionally
 7 barred.

8 **2. There Is No Plausible Lanham Act Claim Here.**

9 Plaintiff’s claim fails even without applying Rogers, because the use here
 10 cannot plausibly cause viewers to be confused about endorsement.

11 In cases largely pre-dating the widespread adoption of Rogers, courts
 12 consistently found, as a matter of law, that reasonable viewers would not be
 13 confused by seeing a plaintiff’s likeness (or trademark) in a fictional film or TV
 14 show. Courts “disposed of trademark claims where simply looking at the work
 15 itself, and the context in which it appears, demonstrates how implausible it is that a
 16 viewer will be confused into believing that the plaintiff endorsed the defendant’s
 17 work (and without relying on the likelihood of confusion factors to do so)....”
 18 Louis Vuitton, 868 F.Supp.2d at 183.

19 For example, in Brown v. Twentieth Century Fox, 799 F.Supp. 166 (D.D.C.
 20 1992), the court rejected James Brown’s Lanham Act claim, concluding that no
 21 “reasonable jury” could conclude, based on a film’s inclusion of a 27-second clip of
 22 him performing, that Brown “endorsed the film or personally approved the use of
 23 the clip” Id. at 173. Similarly, in Sporting Times, the court found that the
 24 Lanham Act claim was constitutionally barred, but independently held, as a matter
 25 of law, that there could not be any likelihood of confusion from a film’s brief

26
 27 _____
 28 of any endorsement of the show; noting that plaintiff was not listed in the show’s
 credits).

1 depiction of a magazine with the same title as the plaintiff's publication. 291
 2 F.Supp.3d at 824-25. It was "simply not plausible" that using the fictional
 3 publication "in a brief montage, ... to inform viewers about the arc of [the
 4 protagonist's] career," would "confuse" the plaintiffs' trademark "as being the
 5 'origin' of the film itself." Id. at 824, 825.⁷

6 Plaintiff's image appears for a few seconds in a group photograph identified
 7 as depicting the Top Gun "class" from the Original Film, in a scene explaining the
 8 relationship between two other characters in that film. See Cmplt. ¶ 38; Ex. B at
 9 44:22-44:44. Plaintiff is not the focus of the scene and is not specifically
 10 mentioned; he is not otherwise depicted in the Film; and he is not listed in its
 11 credits. Ex. B at 2:01:36-2:09:43. No reasonable viewer would glean anything
 12 from the photograph about Plaintiff, other than that he portrayed "Wolfman" in the
 13 Original Film. Plaintiff's Lanham Act claim fails for this additional reason.

14 **B. Plaintiff's Misappropriation Claims Fail As A Matter Of Law.**

15 Plaintiff's Third and Fourth Causes of Action, for statutory and common-law
 16 misappropriation, arise entirely from the appearance of his image in the Film. E.g.,
 17 Cmplt. ¶¶ 78, 89. These claims also fail.

18 **1. The First Amendment Bars Misappropriation Claims
 19 Arising From Expressive Works.**

21
 22 ⁷ Accord Burnett v. Twentieth Century Fox, 491 F.Supp.2d 962, 973 (C.D.
 23 Cal. 2007) ("no reasonable viewer would mistake the" use of plaintiff's likeness in
 24 animated TV show as endorsement); Fortres Grand v. Warner Bros., 763 F.3d 696,
 25 700 (7th Cir. 2014) (affirming Rule 12(b)(6) dismissal of trademark claim based on
 26 depiction of trademark in film, "The Dark Knight"); Davis v. Walt Disney, 430
 27 F.3d 901, 905-06 (8th Cir. 2005) (rejecting claims based on alleged use in fictional
 28 film, noting "circumstances surrounding the appellees' use of the mark make
 confusion less likely than in a traditional trademark infringement action"); Gottlieb
 v. Paramount Pictures, 590 F.Supp.2d 625, 635 (S.D.N.Y 2008) (claim that using
 plaintiff's pinball machine in fictional film "would confuse ordinarily prudent
 consumers as to the sponsorship or affiliation ... is simply not plausible").

1 The Ninth Circuit has held that a right-of-publicity claim targeting expressive
 2 speech is “presumptively unconstitutional.” Sarver v. Chartier, 813 F.3d 891 at 903
 3 (9th Cir. 2016). “State laws, including state common law, may not restrict
 4 expression because of its message, its ideas, its subject matter, or its content.” Id.
 5 (quotation omitted). Because “California’s right of publicity law clearly restricts
 6 speech based upon its content,” it is subject to the highest level of constitutional
 7 scrutiny; it “may be justified only if the government proves that [application is]
 8 narrowly tailored to serve compelling state interests.” Id. Under controlling Ninth
 9 Circuit and California law (and consistent with cases from across the country), there
 10 is no such countervailing interest where a right-of-publicity claim targets the
 11 content of an expressive work.

12 For example, in Guglielmi v. Spelling-Goldberg Prods., 25 Cal.3d 860, 866
 13 (1979), the California Supreme Court rejected a right-of-publicity claim brought by
 14 the heirs of actor Rudolph Valentino based on a fictional film. Id. at 866. In a
 15 concurrence that the Court has recognized as controlling,⁸ then-Chief Justice Bird
 16 explained that the film was an expressive work entitled to First Amendment
 17 protection, and there was no countervailing interest that could “clearly outweigh the
 18 value of free expression in this context.” Id. at 871 (Bird, C.J., concurring).
 19 Consequently, a “cause of action for the appropriation of Valentino’s right of
 20 publicity through the use of his name and likeness in respondents’ film may not be
 21 maintained.” Id. at 872 (emphasis added). See also Polydoros v. Twentieth
 22 Century Fox, 67 Cal.App.4th 318, at 320-21, 324-25 (1997) (rejecting
 23 misappropriation claim based on alleged use of the plaintiff’s likeness in a fictional
 24 film; “[b]ecause respondents were creating a fictionalized artistic work, their

25
 26
 27 ⁸ The Chief Justice’s opinion “commanded the support of the majority of the
 28 court,” because it was joined or endorsed by three other Justices. Comedy III
Prods., Inc. v. Gary Saderup, Inc., 25 Cal.4th 387, 396 n.7 (2001).

endeavor is constitutionally protected” and “Guglielmi unequivocally prevents appellant from proceeding on his claim for commercial appropriation of identity”).

In Sarver, the Ninth Circuit applied this strict First Amendment scrutiny to a right-of-publicity claim alleging the unauthorized use of the plaintiff’s identity in “The Hurt Locker,” a fictional film about the Iraq war. 813 F.3d at 903-04. The court granted the filmmakers’ SLAPP motion, finding the movie “is speech that is fully protected by the First Amendment,” and there was no “compelling state interest in preventing the defendants’ speech.” Id. at 905-06. Similarly, a state appeals court applied heightened First Amendment scrutiny in striking actress Olivia de Havilland’s right-of-publicity claim based on the portrayal of her in the TV docudrama “Feud.” de Havilland v. FX Networks, 21 Cal.App.5th 845, 860-61 (2018). The court noted that federal and state courts consistently have followed Guglielmi and its progeny, and “Feud is as constitutionally protected as was the film in Sarver, The Hurt Locker.” Id. at 860.⁹

Plaintiff’s right-of-publicity claims hinge entirely on the inclusion of his image in the Film. Cmplt. ¶¶ 77-101. But as a matter of law, the creators of the Film could show Plaintiff “without acquiring [the] rights” to his image. de Havilland, 21 Cal.App.5th at 861. There is no countervailing interest that could “outweigh the value of free expression in this context”; thus, Plaintiff’s right of publicity claims “may not be maintained.” Guglielmi, 25 Cal.3d at 872 (Bird, C.J., concurring).¹⁰

⁹ Courts across the country are in accord. See J. Thomas McCarthy, The Rights of Publicity and Privacy § 8:47 (2d ed. 2023) (“[t]he majority view is that fictional works are protected by the First Amendment as being informative or entertaining ‘speech,’ such that fictional uses of identity cannot be actionable”; collecting cases); SLAPP Motion, note 17.

¹⁰ Plaintiff vaguely alludes to his image being used to ‘market and promote’ the Film, but he does not identify any such promotional use. E.g., Cmplt. ¶¶ 10, 80. Even if the Photograph was used in promotions for the Film, however, Plaintiff would not have a viable misappropriation claim, because “[a]dvertising for

2. Paramount's Use Is Transformative.

The use of Plaintiff's likeness in the Film also is protected under California's transformative use test. “[W]hen an artist is faced with a right of publicity challenge to his or her work, he or she may raise as [an] affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame.” Winter, 30 Cal.4th at 890 (quoting Comedy III, 25 Cal.4th at 407). In de Havilland, the court observed that typically it is not necessary to reach the transformative use test where, as here, the claims arise from a traditional expressive work like a film or television show (as opposed to “products and merchandise” like the t-shirts at issue in Comedy III). 21 Cal.App.5th at 863.

Nonetheless, the court applied the test in the alternative, holding that a television program portraying the plaintiff was sufficiently transformative because her likeness was but one of the “raw materials from which the [show] is synthesized.” Id. Thus, the series’ “marketability and economic value” did not “derive primarily from [celebrity’s] fame” but rather “[came] principally from ... the creativity, skill, and reputation” of the series’ creators and actors.” Id. at 864 (“[w]hile viewers may have ‘tuned in’ to see these actors and watch this Hollywood tale, there is no evidence that de Havilland as a character was a significant draw”).

Here, Plaintiff's image appears for a few seconds in a two-hour film, in a group photograph where the focus is on Maverick and Goose. It "defies credibility" to suggest that the Film derived any economic value "from appropriation of plaintiff's name and identity" instead of from "the creativity, skill, and reputation,"

constitutionally protected expressive media shares the constitutional immunity of the media use itself.” McCarthy at § 8:66. Accord Daly v. Viacom, 238 F.Supp.2d 1118, 1123 (N.D. Cal. 2002) (because TV show was “an expressive work protected by the First Amendment, plaintiff cannot state a misappropriation claim based on the use of her likeness in the program or the advertisements for the program”).

1 of the Film's creators and performers. Ross v. Roberts, 222 Cal.App.4th 677, 688
 2 (2013).

3 The use of Plaintiff's image also is transformative because the Film "do[es]
 4 not depict [P]laintiff[] literally" – that is, as Barry Tubb – but rather as a "fanciful,
 5 creative character[]" – as "Wolfman," identifiable to viewers via the "signature"
 6 cowboy hat and the context in which he appears (alongside Maverick, Goose,
 7 Iceman, and other members of the fictional "Top Gun" class of 1986). Winter, 30
 8 Cal.4th at 890, 892. See also Landham v. Lewis Galoob Toys, 227 F.3d 619 (6th
 9 Cir. 2000) (actor failed to show that defendant's toy "invokes his own persona, as
 10 distinct from that of the fictional character" he portrayed; rejecting misappropriation
 11 claim because "the focus of any right of publicity analysis must always be on the
 12 actor's own persona and not the character's").

13 Moreover, according to Plaintiff, the Photograph was literally transformed:
 14 he alleges it was adapted from a behind-the-scenes picture, and altered to fit the
 15 Film's storyline. See Cmplt. ¶¶ 38-40. That is a classic example of a protected
 16 transformation of a likeness. See Daniel, 8 Cal.App.5th at 396-97 (First
 17 Amendment barred right-of-publicity claims brought by actor in film based on
 18 producer's use of actor's image in Internet post related to film that "added
 19 something new to [plaintiff's] image, altering it with a new expression, meaning, or
 20 message"). For this additional reason, Plaintiff's claims are barred.

21 3. Plaintiff's Claims Are Preempted.

22 The Copyright Act provides the sole remedy for all claims invoking rights
 23 "equivalent to any of the exclusive rights within the general scope of copyright ...
 24 in works of authorship[.]" 17 U.S.C. § 301(a).¹¹ Where a state law claim falls
 25 within the exclusive sphere of the Copyright Act, it is preempted and must be

27 28 ¹¹ These include the "exclusive right" to reproduce and distribute the
 copyrighted work. 17 U.S.C. § 106(1)-(3).

1 dismissed.

2 There is “a two-part test to determine whether a state law claim is preempted
 3 by the [Copyright] Act.” Laws v. Sony Music Entm’t, Inc., 448 F.3d 1134, 1137
 4 (9th Cir. 2006). First, a court must determine whether the claims concern a “work”
 5 covered by the Copyright Act – i.e., one of the categories of “original works of
 6 authorship fixed in any tangible medium of expression” in Section 102, such as a
 7 pictorial work or motion picture. Id. at 1140; 17 U.S.C. § 102(a). Second, the court
 8 determines “whether the rights asserted under state law are equivalent to … the
 9 exclusive rights of copyright holders.” Laws, 448 F.3d at 1138. This requires
 10 preemption unless the claim has “an extra element which changes the nature of the
 11 action.” Del Madera Props. v. Rhodes & Gardner, 820 F.2d 973, 977 (9th Cir.
 12 1987), overruled on other grounds, Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994).
 13 Both prongs are met here.

14 **a. The Work Is Within the Subject Matter of Copyright.**

15 The first prong is met “when the work of authorship being copied or
 16 misappropriated ‘fall[s] within the ambit of copyright protection.’” NBA v.
 17 Motorola, 105 F.3d 841, 848 (2d Cir. 1997). Here, Plaintiff’s claims are based on
 18 the Film’s depiction of a photograph that includes his image. Cmplt. ¶¶ 38, 39, 77,
 19 88. Photographs indisputably fall within the ambit of copyright protection, which
 20 extends to all “original works of authorship fixed in any tangible medium of
 21 expression,” including “pictorial … works,” which, by definition, include
 22 photographs. 17 U.S.C. §§ 101, 102(a). The initial requirement is met. See
 23 Maloney v. T3Media, 853 F.3d 1004, 1011-16 (9th Cir. 2017) (right-of-publicity
 24 claims based on defendant’s licensing of photographs depicting plaintiffs fell within
 25 subject matter of copyright).

b. The Rights Here Are Equivalent To Exclusive Rights Under Copyright Law.

Section 106 of the Copyright Act grants certain rights, including the rights to display works to the public and to reproduce works.¹² Because Plaintiff seeks to control Paramount’s reproduction and display of a photograph containing an image of him – that is, because the rights he seeks to control are equivalent to copyright rights – Plaintiff’s claims satisfy the second part of the preemption test. See Del Madera, 820 F.2d at 976-77 (to survive preemption, claim “must protect rights which are qualitatively different from … copyright rights”).

Plaintiff cannot plead around preemption. First, where, as here, the plaintiff's likeness is embodied in a copyrightable work which the defendant uses in its own artistic work, preemption applies regardless of whether the plaintiff purports to protect his "image" or "persona." See Cmplt. ¶¶ 4-5. In Laws, the court rejected the plaintiff's attempt to distinguish copyright claims as "protect[ing] ownership rights to a work of art," while publicity claims "concern[] the right to protect one's persona and likeness." 448 F.3d at 1139. Instead, it held that where the defendant is not exploiting plaintiff's likeness other than as it appears in a fixed copyrightable work, the claim falls within the subject matter of copyright. Id. at 1139.

The Ninth Circuit applied the same principle in reaching the “obvious conclusion” that an actor’s claim challenging duplication of his “persona,” as fixed in a video, was preempted. Jules Jordan Video, 617 F.3d at 1153. See also Maloney, 853 F.3d at 1007, 1019 (misappropriation claims based on “non-commercial art use” of photographs depicting plaintiffs “challenge control of the

¹² Plaintiff concedes that he does not own the copyright in the Photograph. Cmplt. ¶¶ 4, 39. Plaintiff's claims are preempted regardless of the owner. See Jules Jordan Video v. 144942 Canada, 617 F.3d 1146, 1154 (9th Cir. 2010) ("[i]f a plaintiff asserts a claim that is the equivalent of a claim for infringement of a copyrightable work, that claim is preempted, regardless of what legal rights the defendant might have acquired").

1 artistic work itself,” not the use of plaintiffs’ underlying likenesses); Kinney v.
 2 Oppenheim, 2011 WL 13217573, at *8 (C.D. Cal. Mar. 3, 2011) (publicity claim
 3 preempted where its “essence” was that defendants “displayed [a] video – a
 4 protected work under the Copyright Act – and [plaintiff’s] performance therein – a
 5 copyrightable dramatic work under the Copyright Act – without his permission”).

6 Plaintiff’s appearances as Wolfman¹³ in works fixed in a tangible medium
 7 (the Photograph and the Film) are the bases for his right-of-publicity claims, which
 8 are preempted. See Dryer v. NFL, 55 F.Supp.3d 1181, 1201-02 (D. Minn. 2014)
 9 (football players’ misappropriation lawsuit arising from video of them playing was
 10 preempted).

11 Second, for preemption purposes, “a claim for a violation of the right to
 12 publicity against a copyrighted work will lie only if that work is used for
 13 advertising, not in an expressive work.” Maloney v. T3Media, 94 F.Supp.3d 1128,
 14 1138 (C.D. Cal. 2015), aff’d, 853 F.3d at 1004 (9th Cir. 2017) (citation omitted).
 15 This dooms Plaintiff’s claims.

16 Despite his vague references to promotions (e.g., Cmplt. ¶¶ 10, 80), Plaintiff
 17 does not assert any facts showing a promotional use of his image, nor could he do
 18 so. The Complaint arises entirely from the use of the Photograph in the Film itself.
 19 See Cmplt. ¶¶ 38, 54. Accord id. ¶ 2 (alleging Plaintiff’s image was used in the
 20 Film). See Maloney, 853 F.3d at 1016, n.9 (misappropriation claim preempted
 21 where plaintiff is “objecting to the unauthorized distribution and republication of a
 22 copyrighted work, not the exploitation of his likeness on an unrelated product or in
 23 advertising”; “[t]he fact that the [challenged works] were sold for a profit … does
 24 not alter our analysis”).

25
 26
 27 ¹³ See Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1224
 28 (9th Cir. 2008) (film characters that are “sufficiently delineated” and “display
 consistent, widely identifiable traits” receive copyright protection).

1 Moreover, even a cursory review of the Film demonstrates that the
 2 Photograph served an expressive purpose. As Plaintiff concedes, it shows “the
 3 fictional Top Gun Class of 1986,” and is used to explain how Rooster’s classmates
 4 learned the connection between him and Maverick. See Cmplt. ¶ 38, Exs. D-E.
 5 This expressive purpose does not seek an advantage from Plaintiff’s personal
 6 image, weighing in favor of preemption. See In re Jackson, 972 F.3d 25, 48-49 (2d
 7 Cir. 2020) (when “the advantage sought by the defendant flows from the
 8 reproduction or dissemination of the work itself (as opposed to the persona of the
 9 plaintiff)” that “argues in favor of preemption”).

10 Third, Plaintiff’s assertion that Paramount “destroyed any purported
 11 copyright” when it “altered the image” is nonsensical. Cmplt. ¶ 5. No authority is
 12 cited for this proposition, which is contrary to the plain terms of the Copyright Act.
 13 See 17 U.S.C. §§ 101, 103 (“subject matter of copyright … includes … derivative
 14 works”; derivative works include those “based upon one or more preexisting works,
 15 such as … [an] art reproduction, abridgment, condensation, or any other form in
 16 which a work may be recast, transformed, or adapted”). Altering a work does not
 17 diminish the owner’s copyright in the preexisting material. See 17 U.S.C. § 103(b).
 18 It has no bearing on the preemption analysis.

19 Finally, Plaintiff’s theory would effectively grant every individual depicted in
 20 a photograph “veto power” over its use and monopoly control over the copyright.
 21 Maloney, 94 F.Supp.3d at 1138. This is contrary to the long-established rule that
 22 the copyright in a photograph vests in the photographer, not the subject. See
 23 Burrow-Giles Lithographic v. Sarony, 111 U.S. 53, 60 (1884). Plaintiff’s
 24 misappropriation claims are preempted and must be dismissed.

25 **4. Plaintiff’s Contract Permitted The Use.**

26 Plaintiff’s claims independently fail because the parties’ Agreement gave
 27 Paramount the right to use Plaintiff’s likeness in connection with the “Wolfman”
 28 character. See Pl. Ex. A; see also Daniel v. Wayans, 8 Cal.App.5th 367 at 393, 394

1 (2017) (dismissing misappropriation claims on First Amendment grounds and,
 2 alternatively, because contract permitted use).

3 Under California law, “[c]ontract terms are to be given their ordinary
 4 meaning, and when the terms of a contract are clear, the intent of the parties must be
 5 ascertained from the contract itself.” Klamath Water Users Prot. Ass’n v. Patterson,
 6 204 F.3d 1206, 1210 (9th Cir. 1999).¹⁴ The Agreement states unambiguously that
 7 Paramount “will be the sole and exclusive owner of all rights in the role or character
 8 portrayed by [Plaintiff], including name, likeness and distinctive characterizations
 9 thereof,” and that it has “the right to merchandise and exploit such role or character,
 10 and the right to use [Plaintiff’s] name and likeness in connection therewith” Pl.
 11 Ex. A at 7 ¶ A. Nothing in that sentence limits Paramount’s exploitation of the
 12 Wolfman character – or its exploitation of Plaintiff’s likeness “in connection
 13 therewith” – to the Original Film.¹⁵ Indeed, the reference to “merchandise”
 14 conclusively demonstrates that Paramount’s rights to the Wolfman character (and to
 15 the use of Plaintiff’s image in connection therewith) were *not* limited to the Original
 16 Film (or even to expressive works). And as Plaintiff concedes, the Film shows him
 17 “as Wolfman, wearing his signature cowboy hat.” Cmplt. ¶ 46 (emphasis added).

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 19
 20
 21 ¹⁴ See also Cal. Civ. Code § 1638 (“[t]he language of a contract is to govern
 22 its interpretation, if the language is clear and explicit, and does not involve an
 23 absurdity”); id. § 1639 (“[w]hen a contract is reduced to writing, the intention of the
 24 parties is to be ascertained from the writing alone, if possible ...”).

25 ¹⁵ Because this language is unambiguous, Plaintiff cannot add new limitations
 26 that are not in the contract. In any event, his rationalization that “movie sequels
 27 were virtually non-existent” in 1985 (Cmplt. ¶ 1), is plainly wrong. E.g.,
Kuhn v. Vortex, 747 F.2d 1022, 1023 (5th Cir. 1984) (case involving “film sequel
 28 agreements” from 1981); Universal City Studios v. Film Ventures Intern., 543
 F.Supp. 1134, 1139 (C.D. Cal. 1982) (case involving 1978 “sequel to ‘Jaws’
 entitled ‘Jaws 2’”).

1 This use of Plaintiff's image is expressly permitted by the Agreement. Pl. Ex. A.¹⁶
 2 He is not depicted anywhere else in the film. Cmplt. ¶ 38; Ex. B.

3 Plaintiff references two other sentences, neither of which assists him. One
 4 grants Paramount rights to use Plaintiff's "name, photograph, likeness, voice ... and
 5 biography in connection with advertising, publicizing, and exploiting the Picture,"
 6 but that pertains only to a separate use of Plaintiff's own persona in promoting the
 7 Original Film – hence the reference to his personal "biography." Cmplt. ¶ 36
 8 (citing Pl. Ex. A at 7 ¶ A). The other makes Paramount the owner of all results and
 9 proceeds of Plaintiff's "services" on the Original Film, but that applies to "literary
 10 and musical material" and "designs and inventions of" Plaintiff, i.e., additional
 11 rights beyond the exploitation of the character. Id. Neither line restricts the
 12 separate clause explicitly granting Paramount broader rights in the character –
 13 including any use of Plaintiff's image in connection with the character – which is
 14 not limited to uses in "the Picture." See Levi Strauss & Co. v. Aetna Cas. & Sur.
 15 Co., 184 Cal.App.3d 1479, 1486 (1986) (the court "does not have the power to ...
 16 insert in the contract language which [Plaintiff] now wishes were there"). Because
 17 the Agreement explicitly authorizes the complained-of use, Plaintiff's claims fail.

18 **5. Plaintiff's Statutory Misappropriation Claim Fails For Additional
 19 Reasons.**

20 Section 3344 only applies to the nonconsensual use of a likeness "on or
 21 in products, merchandise, or goods, or for purposes of advertising or selling, or

22
 23 ¹⁶ Plaintiff's characterization of the underlying Photograph as a "personal
 24 picture" is irrelevant; he admits Paramount used it in the Film to portray him as
 25 "Wolfman," not as Barry Tubb (Cmplt. ¶¶ 40, 46), and Plaintiff does not (and
 26 cannot) allege that he owns the copyright in the Photograph. His attempt to
 27 distance his appearance in the Photograph from his character also fails, because he
 28 admits wearing Wolfman's "signature cowboy hat" in the Photograph, and the
 character's flight suit. Cmplt. ¶¶ 40, 46. His claim that he was wearing a "personal
 watch" is irrelevant; it is virtually indistinguishable from the watch Wolfman wears
 in "Top Gun." Compare Ex. D with Ex. C at 33:41-33:48.

1 soliciting purchases of, products, merchandise, goods, or services.” Cal. Civ. Code
 2 § 3344(a) (emphasis added). Consequently, the court in de Havilland raised the
 3 “preliminary question of whether the portrayal of a real person in a television
 4 program (or a book, play, or film) constitutes the ‘use’ of that person’s … ‘likeness’
 5 ‘on or in’ a product, merchandise, or good.” 21 Cal.App.5th at 857. The court
 6 strongly suggested that the answer is “no,” citing the Ninth Circuit’s observation
 7 that a film is a constitutionally-protected expressive work, “‘not speech proposing a
 8 commercial transaction.’” Id. (quoting Server, 813 F.3d at 905). For the same
 9 reasons, this Court should hold that Plaintiff has failed to allege an actionable “use”
 10 of his likeness because it was not in connection with a product or other commercial
 11 item. Id.

12 In addition, Plaintiff’s Section 3344 claim fails under the statute’s “definable
 13 group” exemption. Plaintiffs suing over photographs must “be represented as
 14 individuals rather than solely as members of a definable group represented in the
 15 photograph”; plaintiffs are in a “definable group if they are represented in the
 16 photograph solely as a result of being present at the time the photograph was taken
 17 and have not been singled out as individuals in any manner.” Cal. Civ. Code §§
 18 3344(b)(2)-(3).

19 The Photograph is a classic “group” image; the unaltered version shows cast
 20 members from the Original Film posing with their Navy trainers; in the Film, it is
 21 portrayed as Maverick’s Top Gun class. See Ex. B at 44:22; Pl. Ex. C; Cmplt. ¶¶
 22 38, 39; Lightbourne v. Printroom, 307 F.R.D. 593, 602 (C.D. Cal. 2015) (“photos of
 23 … teams posing” fit definition of definable group). The Film shows the entire group
 24 photograph, with 20 people visible, then three close-ups that focus primarily on
 25 Maverick and Goose (as does the dialogue), with Plaintiff’s character visible in part.
 26 See Ex. B at 44:22, 44:28, 44:34; 44:43. Because Plaintiff is not “singled out as

27
 28

1 [an] individual[] in any manner" (Cal. Civ. Code § 3344(b)(3)),¹⁷ his Section 3344
 2 claim fails on this additional ground.

3 **C. Plaintiff's Derivative Negligence Claim Is Meritless.**

4 Plaintiff's Fifth Cause of Action for Negligent Hiring Etc. is entirely
 5 duplicative of his misappropriation claims (see Cmplt. ¶ 103), and fails for the same
 6 reasons. See Polydoros, 67 Cal.App.4th at 326 (dismissing similar tack-on
 7 negligence claim where right of publicity claims were barred by the First
 8 Amendment). Plaintiff's negligence claim also fails because he has not pleaded any
 9 cognizable duty owed by Paramount. See Felton v. Schaeffer, 229 Cal.App.3d 229,
 10 239 (1991) (declining to recognize "negligence duty" where claim was based on
 11 allegedly false publication).

12 **D. Plaintiff's Breach Of Contract Claim Fails.**

13 Plaintiff's Sixth Cause of Action also fails, because Plaintiff's own pleading
 14 makes clear that there was no contractual breach by Paramount. Paramount's use of
 15 Plaintiff's image is authorized by the Agreement, which alone forecloses this claim.
 16 See Section III.B.4 supra. But even without this express authorization, Plaintiff's
 17 contract claim fails because he cannot identify any obligation in the Agreement that
 18 Paramount purportedly breached.

19 Plaintiff acknowledges that the Agreement only obligated Paramount to
 20 compensate Plaintiff for "services" he rendered on Top Gun – i.e., "principal
 21 photography, filming, post-production, looping and/or dubbing, and other services
 22 required to complete and promote the [Original Film]." Cmplt. ¶ 115. Accord
 23 Cmplt. ¶¶ 33, 42, 114, 120. Plaintiff does not, and cannot, allege that Paramount
 24 failed to perform its obligations, nor does the Agreement prohibit Paramount from
 25 using his likeness in another film. Plaintiff cites a boilerplate term stating that

27 ¹⁷ The screenshot attached to Plaintiff's Complaint (Exhibit D) appears to be
 28 cropped to make Plaintiff appear more prominent; the Film has no such close-up
 shot of Maverick, Goose, and Wolfman. See Exs. D-E.

1 modifications must be in writing (Cmplt. ¶ 121 (citing Pl. Ex. A, p. 3 ¶ 10)), but that
 2 does not create any additional obligation. See Section III.B.4.¹⁸ Plaintiff's contract
 3 claim fails as a matter of law.

4 **E. Plaintiff's Declaratory Relief Claim Fails.**

5 Plaintiff's First Cause of Action for Declaratory Relief is wholly derivative of
 6 his other claims. Cmplt. ¶¶ 61-67. The "Declaratory Judgment Act does not
 7 provide an independent theory for recovery; if the underlying claims are dismissed,
 8 ... there is no basis for any declaratory relief." Hammerling v. Google, 615
 9 F.Supp.3d 1069, 1097 (N.D. Cal. 2022). Plaintiff's declaratory relief claim fails
 10 along with the underlying claims. Sections III.A-III.D.¹⁹

11 **F. Plaintiff Has No "Injunctive Relief" Claim.**

12 Plaintiff's attempt to plead an "injunctive relief" claim fails because it "is a
 13 remedy, not a cause of action." Callaway v. Mercedes-Benz USA, 2016 WL
 14 11756827, at *3 (C.D. Cal. May 12, 2016). An injunction also would be an
 15 unconstitutional prior restraint on speech. Cmplt. ¶¶ 125-26; Garcia v. Google, 786
 16 F.3d 733, 747 (9th Cir. 2015) (ordering takedown of film "is a classic prior restraint
 17 of speech" against which there is a "historical and heavy presumption").

18 Plaintiff is like a licensor arguing that a licensee who exceeded the scope of
 19 the license was in "breach." Courts consistently hold that does not give rise to a
 20 contract claim. E.g., MDY Indus., v. Blizzard Ent., 629 F.3d 928, 939 (9th Cir.
 21 2010) (breach of contractual terms limiting license constitutes copyright
 22 infringement, not breach of contract).

23 ¹⁹ If Plaintiff seeks a declaration about "merchandise" or "advertising" for the
 24 Film (Cmplt. ¶¶ 61-62), there is no justiciable controversy; he does not, and cannot,
 25 allege that Paramount used (or sought to use) his image in that way. See Marino v.
 26 Countrywide Financial, 26 F.Supp.3d 955, 961-62 (C.D. Cal. 2014) (declaratory
 27 relief claim not ripe where it was "contingent" on "events that may not occur as
 28 anticipated, or indeed at all").

IV. CONCLUSION

Where, as here, claims targeting the use of the plaintiff's likeness in an artistic work meet the requirements of the Rogers test, "the public interest in free expression outweighs the public interest in avoiding consumer confusion," and the claims should be dismissed on the pleadings. Brown, 724 F.3d at 1248 (affirming dismissal without leave to amend); Jackson, 506 F.Supp.3d at 1016-17 (dismissing trademark and derivative claims with prejudice because TV show was "protected under Rogers," so "amendment would be futile"). Plaintiff's Complaint similarly should be dismissed with prejudice.

DATED: April 18, 2024

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for defendant Paramount Pictures Corporation, certifies that this brief contains 6,997 words, which complies with the word limit of L.R. 11-6.1.

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